United States Court of Appeals

for the Second Circuit

APPENDIX

B P/S

76-1154

To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

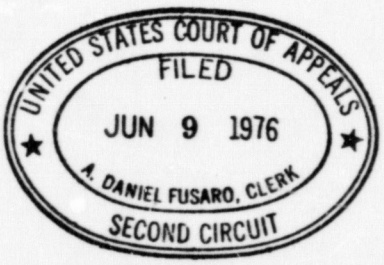
CLARENCE R. SEARS, JR.,

Defendant-Appellant.

Docket No. 76-1154

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
CLARENCE R. SEARS, JR.
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

D.C. DISTRICT COURT — CRIMINAL DOCKET

Felony ☒ Misdemeanor ☐ Offense Code: 0208 | 1 | District Office

JUDGE/MAGISTRATE: Assigned Trial 0843 | Disp./Sentence

• U.S. vs. SEARS, CLARENCE R. JR., defendant

Case Filed: Day 31 | Mo. 12 | Yr. 75 | Docket No. 1270

No. of Defdnts: 01 •

MAGR. CASE NO. 75-1505

CHARGES

U.S. CODE SECTION	OFFENSES	COUNTS
18:894	Collection of credit by means of extortion.	2

U.S. Attorney or Asst.

Defense: CJA Ret. Waived Self None Other PD. CD

ATTORNEYS

Marc Marmaro
(212) 791-1941

BAIL & RELEASE

☐ Denied
☐ Personal Recog.
☐ Unsecured Bond
☐ Conditional Release
AMT Set (000) $ ____ date ____
☐ 10% Depo
☐ Surety Bo
☐ Collateral
☐ Bail Not Made
☐ Bail Status Changed (See Docket)
☐ 3rd Party Custody
☐ PSA

ARREST | **INDICTMENT** ☒ | **ARRAIGNMENT** | **TRIAL** | **SENTENCE**

ARREST: Date of ☐ U.S. Custody Began on Above Charges; ☐ Prosecution Deferred

☐ High Risk Defn. & Date Design'd

INDICTMENT: ☐ Information; 12-31-75; Waived ☐; ☐ Superseding Indict/Info

ARRAIGNMENT: 1st Plea; Final Plea; Trial Set For; ☐ Not Guilty ☐ Nolo ☐ Guilty; ☐ Not Guilty ☐ Nolo ☐ Guilty

TRIAL: ☐ Voir Dire; Trial Began ☐ J ☐ N; Trial Ended

SENTENCE: Disposition; ☐ Convicted ☐ Acquitted ☐ Dismissed: ☐ Nolled/Discontinued • ☐ On All Char ☐ On Lesser • Offense(s) ☐ WOP; ☐ W

		DATE	INITIAL/No.
Search Warrant	Issued		
	Return		
Summons	Issued		
	Served		
Arrest Warrant			
COMPLAINT		11-10-75	HJR-080D
OFFENSE (In Complaint)			

INITIAL APPEARANCE — INITIAL/No.

PRELIMINARY EXAMINATION OR REMOVAL HEARING: Date Scheduled 12-1-75; Date Held ____; ☐ Waived ☐ Not Waived; ☐ Intervening Indictment

Tape No. — INITIAL/No.

OUTCOME

☐ Dismissed
☐ Held for District GJ
BOND: ☐ Exonerated ☐ To Transfer District
☐ Held to Answer to U. S. District Court
AT:
Magistrate's Initials

• Show last names and suffix numbers of other defendants on same indictment/information

V. Excludable Delay (a) (b) (c)

PROCEEDINGS

DATE	PROCEEDINGS
12-31-75	Filed indictment.
1-12-76	Deft.(atty. present) Deft. continued on $5,000. P.R.B. on condition he have no communication with James Johnson. Case assigned to Judge Cannella for all purposes. Deft Pleads not guilty. Bonsal,J.
1-14-76	Filed following papers recv'd. from Magistrate..complaint, P.R.B. in amt. of $5,000, financial affdvt.
2-25-76	Trial begun before Cannella,J. with a Jury
2-26-76	Trial cont'd.
2-27-76	Trial cont'd. deft moves to consolidate counts 1 & 2 Granted...Trial concluded - Jury finds deft Guilty P.S.I. ordered Sent. on 4-5-76 at 9 30 a.m. Room 705 Bail cont'd.....Cannella,J.
4-5-76	Filed Judgment (atty. John P. Curley, present).. Imposition of sentence is suspended. Deft. is placed on probation for a period of THREE (3) YEARS, subject to the standing probation order of this court.. SPECIAL CONDITIONS OF PROBATION.. deft. to make a serious effort to stop drinking intoxicating liquors.. CANNELLA, J. Ent. 4-5-76
4-5-76	Filed notice of appeal from judgmt.dtd. 4-5-76..Appeal in forma pauperis is granted...Cannella,J. copy for deft mailed to his atty. and copy given to U.S.Atty.

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
04-6-76	Filed motion to dismiss indictment				
04-6-76	Filed Govts requested voir dire				
04-6-76	Filed Govts request to charge				
05-10-76	Filed notice that the original record on appeal has been certified and transmitted to the U.S.C.A.				
05-26-76	Filed notice that the supplemtal record on appeal has been certified and transmitted to the U.S.C.A.				
5-26-76	Filed transcript dated Feb. 25, 26, 27, 1976				
6-4-76	Filed transcript of record of proceedings, dated 4-5-76				

(a) Interval (b) Start Date (c) Ltr. Code (d) Total Days

MM:slc
75-3724
n-1313

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA :

-v- :

CLARENCE R. SEARS, JR., :

Defendant. :

----------x

75 CRIM. 1270

INDICTMENT

75 Cr.

COUNTS ONE AND TWO

The Grand Jury charges:

On or about the dates hereinafter set forth, in the Southern District of New York, CLARENCE R. SEARS, JR., the defendant, unlawfully, wilfully and knowingly, did participate in the use of extortionate means, to wit, express and implicit threats to use force and violence and other criminal means to cause harm to the person of James Johnson, to collect and to attempt to collect an extension of credit made by CLARENCE R. SEARS, JR., the defendant, to James Johnson:

COUNT	DATE
One	November 5, 1975
Two	November 7, 1975

(Title 18, United States Code, Section 894.)

Donald C. Burns, Jr.
FOREMAN

Thomas J. Cahill
THOMAS J. CAHILL
United States Attorney

Form No. USA-33s-274 (Ed. 9-25-58)

75 CRIM. 1270

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

CLARENCE R. SEARS, JR.,

Defendant.

INDICTMENT

75 Cr.

(18 U.S.C. § 894.)

THOMAS J. CAHILL

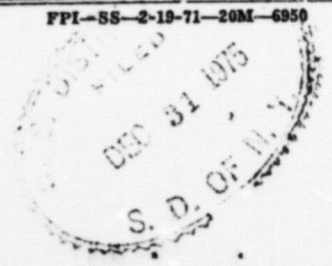
United States Attorney.

A TRUE BILL

Donald C. Sears, Jr.

Foreman.

FPI—8S—2-19-71—20M—6950



December 31 1975-
Filed Indictment. Frankel J

Jan. 12, 1976- Deft. present.
(atty. John D Curley present)
pleads NOT GUILTY. Deft. continued
on $5000. PRB on condition he
have no communication with
James Johnson. Assigned
Cannella J for all purposes.
Bonsal J.

FEB 25 1976 - TRIAL BEGUN BEFORE CANNELLA, J WITH A JURY.

FEB 26 1976 - TRIAL CONTINUED

FEB 27 1976 - TRIAL CONTINUED - DEFT. MOVES TO CONSOLIDATE COUNTS 1 & 2 - GRANTED
TRIAL CONCLUDED - JURY VERDICT DEFT. GUILTY AS CHARGED - JURY POLLED - DEFT RESERVES
MOTIONS FOR DTY OF SENT. PSI ORDERED SENT. ON
4-5-76 AT 9:30 AM ROOM 705 - BAIL CONTD.
CANNELLA J.

ANSA JOSSEN

APR 5 - 1976

DEFT CLARENCE R SIMMS JR (- ATTY. PRESENT)
JOHN P CURLEY
(LEGAL AID).

IMPOSITION OF SENT. IS SUSPENDED — DEFT. IS
PLACED ON PROB. FOR A PERIOD OF 3 YRS, SUBJECT
TO THE STANDING PROB. ORDER OF THIS COURT.

SPECIAL CONDITION: DEFT. TO MAKE A SERIOUS
EFFORT TO STOP DRINKING INTOXICATING LIQUORS.

DEFT. ADVISED OF HIS RIGHT APPEAL

DEFT. TO FILE APPEAL IN FORMA PAUPERIS

CANNELLA, J

N.G.

MM:slc
75-3724
n-1313

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA :

-v- :

CLARENCE R. SEARS, JR., :

Defendant. :

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75 CRIM. 1270

INDICTMENT

75 Cr.

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Form No. USA-33s-274 (Ed. 9-25-58)

75 CRIM. 1270

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

CLARENCE R. SEARS, JR.,

Defendant.

INDICTMENT

75 Cr.

(18 U.S.C. § 894.)

THOMAS J. CAHILL

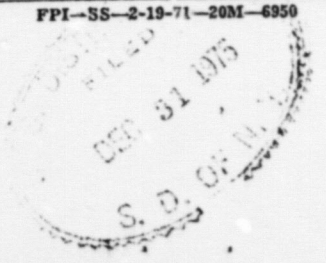
United States Attorney.

A TRUE BILL

Donald C. Barnes, Jr.

Foreman.

FPI—SS—2-19-71—20M—6950



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TRIAL CONCLUDED - JURY VERDICT DEFT. GUILTY AS CHARGED - JURY POLLED - DEFT RESERVES MOTIONS FOR DTY OF SENT. PSI ORDERED SENT. ON 4-5-76 AT 9:30 AM ROOM 705 - BAIL CONTINUED ON CONDITIONS - CANNELLA J.

ANSA JOSSEN

APR 5 - 1976

DEFT CLARENCE R SIMMS JR (ATTY. PRESENT JOHN P CURLEY (LEGAL AID).

IMPOSITION OF SENT. IS SUSPENDED — DEFT. IS PLACED ON PROB. FOR A PERIOD OF 3 YRS, SUBJECT TO THE STANDING PROB. ORDER OF THIS COURT.

SPECIAL CONDITION: DEFT. TO MAKE A SERIOUS EFFORT TO STOP DRINKING INTOXICATING LIQUORS.

DEFT. ADVISED OF HIS RIGHT APPEAL

DEFT. TO FILE APPEAL IN FORMA PAUPERIS

CANNELLA, J

N.G.

Charge of the Court

10:47 A.M.

(In open court, jury present.)

THE COURT: Members of the jury, at this time I want to thank you for the attention you have paid to this case. It's not been a long case but you have been prompt both in coming in the morning and during the luncheon recesses. And that is refreshing, because of the the times that does not happen in this court. I know some of you come from great distances. I also want to thank the lawyers, Mr. Jossen and Mr. Curley for the assistance that they have been to the Court. They have been of help to me during the course of our discussions at the side bar in reference to the law of the case, and also to the presentation of the case. There was very little of the acrimony that sometimes comes up in the trial of a case. So on my behalf and on your behalf, because I think they have assisted you in understanding this case, I thank both Mr. Jossen and Mr. Curley.

I'm not going to discuss the facts at any great length. I will refer to them from time to time but it only is to indicate to you how the law applies to these facts. Any discussion of the facts by me or the discussion of the facts by the lawyers doesn't bind you

in any way, because the facts are your sole and soverign province and nobody can substitute their judgment for yours. Neither the Court nor the lawyers. So that you are the sole and soverign judges of the facts. As we consider the facts, we will see almost immediately that there are areas of agreement here. There is no question, for example, that these two men involved in this case were employees in the post office. There is no question that a loan was made. There is no question that there was part payment of the loan. There is no question that certain compensation took place, as recorded in the tape. So when we get down to the essence of it, we find that there are areas of disagreement here which concern actually the mental operation of these two men, rather than any other aspect of the case.

Of course, when the elements which I will describe to you later are described to you, you will have to find them by **credible evidence beyond a reasonable doubt** in order to convict this defendant. But the point of the matter is that because of this dispute that exists between the parties as to this aspect of the case about which there is disagreement, you have been selected because if there were no questions of fact in this case, then the Judge would decide the whole case and there would be

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need for a jury. Your function is to determine the facts and to determine also the credibility of any of the witnesses that appeared in this case. Nobody can substitue their judgment for that either. You are the ones that determine where the truth lies in this case. On questions of law you must accept them from the court and you must apply them to the facts as you find them, even though it may not agree with what your idea of what the law is. You took an oath and if you remember when I asked you during the selection of the jury, you promised me at that time that you would do that. So if you don't do that, youre stultifying your oath as a juror.

Congress is the only one that can make federal crimes and make acts forbidden so that they constitute federal crime. This is a serious case to both sides, even though it took such a little time to try it. We know that when Congress passes a law they have hearings and they determine in their own judgment what law should exist. They passed this law. The fact of the matter is in this case there are many other implications of other things in this case.

For example, the question of interest which is involved in the case would be another aspect of the law. You are not concerned with that. We're not trying

a so-called usury case here. What we're trying is a law based on a statute which was passed by Congress, and I will describe the elements of that to you later on.

The procedure by which an accusation is made that a law has been violated is the action of the Grand Jury. They listen to the witnesses that are called by the government, and the defendant is not called nor is anybody else, and then if they feel that it's probable that a crime was committed and that the individual involved is the individual that probably committed the crime, they take action and they note what's called a true bill, or an indictment. It's an accusation, that's all. It's not a trial. The trial is here. There comes a time in point of time when the defendant is apprised, told of the fact that he's been indicted. Then he comes into the courtroom in another portion of this building and he makes a plea. In this particular case he pleaded not guilty and therefore, that puts the government, the burden of proof on the government to prove every material fact which is contained in this charge.

Now, we know that under our system of government a defendant in a criminal case is presumed to be innocent, and that that presumption remains with him throughout the trial, unless and until he is proven guilty

of the crime charged by credible evidence beyond a reasonable doubt. The burden of proving the defendant's guilt beyond a reasonable doubt rests upon the government. This burden never shifts throught the trial. The law does not require the defendant to prove his innocence or to produce any evidence. He may rely upon the evidence brought out on cross examination of the witnesses for the government. If the government fails to prove the defendant's guilt by credible evidence beyond a reasonable doubt, it is your obligation to acquit him.

How is the charge proved, or how does a party to a lawsuit bring to the attention of the Court or the jury the arguments upon which they base their request for either a conviction or for money damages in a civil case? Well, it's called evidence. Evidence can be described in a number of ways. The first way evidence can be described is qualitatively and quantitatively. That is, by the kind of evidence that it is and by the amount of evidence that it is. Well, the evidence must be, number one, credible evidence. That is the quality of the evidence. That is, it must be believeable. The evidence must be beyond a reasonable doubt. That is, the amount of the evidence that is necessary. That term defines itself. A reasonable doubt means a doubt that is based upon reason,

and must be a substantial doubt, rather than a speculative doubt. It must be sufficient to cause a reasonable, prudent person to hesitate to act in the more important affairs of his life. Another way to describe evidence is in this way: First, the testimony of witnesses who are sworn and testify to you about matters which they know of their own knowledge. Sometimes the witness is allowed to give opinion. Ordinarily he may not give an opinion. Some witnesses in this case have given an opinion as to the defendant's character or reputation. Anything that is brought out on direct examination or cross examination or any time during the time the witness is on the stand, is evidence in the case and any natural inferences that flow from that testimony is also evidence in the case.

Secondly, we have exhibits, and you have seen them. The tape is an exhibit, the bankbook is another exhibit, and other matters have been marked as exhibits. Only those exhibits which have been marked in evidence are evidence. The ones that were only marked for identification are not in evidence and you may not speculate as to what is in them. They are not for your consideration.

Any stipulation which was entered into between the parties, and none come to mind immediately --

was there any stipulation? Oh, yes, that came from that company, and that they were business records.

Any stipulation that you heard during the course of the trial is evidence in the case and you must consider it as such.

MR. CURLEY: And the one on the tape, the transcript.

THE COURT: That the transcript is the correct transcription of the tape. So that any stipulation you heard at all during the course of the trial, that is evidence and must be considered by you. There is also another phase of that, and that is anything that the Court takes judicial notice of is evidence, and in this case I take judicial notice of the fact that the incidents which occurred in this case as testified happened in the Bronx. And that is within the Southern District of New York, and therefore, I as a judge have a right to hear it and you as the jury have the right to pass on that because it's within the confines of our district.

Evidence can also be described as direct evidence and circumstantial evidence. Direct evidence is where a witness testifies to what he saw, what he heard, what he observed, what he knows of his own knowledge.

Something which comes to him by virtue of using his own senses. Circumstantial evidence, on the other hand, is evidence of facts and circumstances from which one may infer from connected facts other common experiences which happen in mankind. So that it's in a sense a combination of things which you yourself don't see but which you are told and which gives you the right to form a conclusion from that.

Since the charge in this case requires that the defendant act unlawfully, knowingly and willfully, which are mental operations which you can't see, this ordinarily is come to by you making certain decisions to evidence in the case which indicate what the man is thinking, even though he doesn't tell you or you can't see it. If I pick up this glass and you watch me, you know from the fact that I have picked it up, that I start to raise it to my lips, that I am eventually going to drink it. I might stop in the middle and put it back and then of course you'd have to consider that. But you consider a sort of chain of events and make a conclusion as to that. In this case, because the mental operation of the defendant is very much in issue, as well as the mental operation of the so-called victim in the case, Johnson, that is also an issue too. Circumstantial

evidence is an important thing. As a matter of fact, every day of our lives we depend upon circumstantial evidence in many things that we do. In order to determine what you must consider, you should consider what is not evidence, and divorce that from your mind. Some of the things that I would call to your attention which are not evidence is for example the indictment in this case. The indictment in this case contains a statement of facts. That is not evidence in the case. The evidence came from the witnesses. So that the indictment cannot help you in determining what the facts are. It's only the accusation, and that's all that it is. Questions which were asked by the lawyers and which the Court sustained objections to which contained facts are not evidence either, because it's the answer that is the evidence.

A simple example of that is when a witness is asked, for example, when did you stop beating your wife? You can't assume from the question that he ever beat his wife until it's proven. So if there is an objection to that question, you can't say to yourself in deliberating in the case, oh, this man must have beaten his wife because the question was asked. That is not so. It's the answer that is evidence, not the question. Anything that I struck from the record on motion of either side,

which I did from time to time, you must disregard that portion of that which the Court ruled out.

I have already told you that exhibits which are marked for identification are not evidence. Any comments that were made by the lawyers between themselves during the course of the argument or discussion while we were taking evidence is not evidence in the case, any more than what I said during the course of the trial, because we were not sworn and we were not witnesses in this case.

The fact that I asked some questions in this case from time to time does not indicate to you that those questions are any more important than any other questions. All questions are important, whether put by the Court or counsel or anybody else, and you consider all questions in a like manner. None are more important than the other.

How do you find out where the truth lies, because this is your essential duty here. We don't have an IBM machine and we can't put a card in it which will tell us who's telling the truth. So we must rely on certain rules and certain matters which Anglo-Saxon and American juries have from time immemorial used. The first I would call your attention to is the demeanor of the witness. How he appeared to you while he was sitting on the

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stand, how he testified. How he responded to questions. Did he hesitate to gain time to in his own mind make up whatever answer he came up with? Does the answer that he gives fit into the sort of mosaic that you are building here, up on the wall? Do the pieces fit? Is there other testimony that you heard which you feel you want to accept and do accept, does that fit in with that?

Essentially what we're saying is this: Use your common sense, you all have common sense. You don't leave your common sense outside the jury room. You bring it with you and you use your same fine discernment in obtaining judgements in this case as you do in your everyday life when, for example, you are going to buy a car or you are going to get a mortgage, or the Fuller Brush man comes to the door. Use the same kind of common sense as you would in your everyday life activities. Also in determining how you are going to evaluate the testimony, you look into the background of the witness and what is the interest that he has in the case.

For example, the post office employees, they have no interest in this case of any sort that comes to mind. Some of them knew him as colleagues working in the post office. There was some little social connection The agent in the case who testified, he is a government

employee and he goes around doing his job. He testified as to something that the defendant told him. Other witnesses in the case, of course, the two sons, naturally their father is being charged here but that doesn't mean to say that a son who comes in and testifies for the father is going to tell an untruth, particularly, any more than anybody else would.

But you must consider the relationship between the parties in determining how much of the testimony you believe. The defendant of course has a great interest in the case, because based upon your verdict, the possibility of going to jail or being fined or in some way being punished is there. And therefore in the light of the interest of any witness, what the witness' interest was, the so-called victim in this case, Johnson, well, he of course has an interest in the case to the extent that he was the victim of the case and of course you will consider in the light of his interest in the case as to how much of the testimony you believe.

The defendant had a right to take the stand and he had a right not to take the stand. And when he takes the stand he is no different from any other witness. You treat him the same way. There's been some -- we're talking about evaluating testimony as you realize. Part of th

evaluation of testimony involves this testimony of character which was produced on behalf of the defendant. Some of the co-workers and some people that knew him came here and testified, and you should consider such evidence together with all the other facts and all the other evidence in the case in determining the guilt or innocence of this defendant. Evidence of good character or reputation may in itself create a reasonable doubt where without such evidence no reasonable doubt would have existed. But if on all the evidence you are satisfied beyond a reasonable doubt that a defendant is guilty, a showing that he had a previously enjoyed good reputation and character, does not justify or excuse the offense, and you should not acquit a defendant merely because you believe he is a person of good repute in the community.

So in looking into that aspect of it, you will consider that together with all the other evidence and make a judgment on that. We're now coming to the portion of my remarks which concern certain definitions, because the indictment contains various words, some of them which are known to you because they are in everyday use and some of them which have a particular meaning in the law.

The first one I call your attention to are

the three words which appear in the indictment, unlawfully, willfully and knowingly. Let me read the indictment to you because it's such a short indictment.

I will read it to you and then I will define the terms for you.

"The Grand Jury charges that on or about the date hereinafter set forth, in the Southern District of New York, Clarence R. Sears, the defendant, unlawfully, willfully and knowingly did participate in the use of extortionate means, to wit, express and implicit threats to use force and violence and other criminal means to cause harm to the person of James Johnson to collect an extension of credit made by Clarence R. Sears, Jr. to the defendant James Johnson, on November 5th and November 7th of 1975."

The word unlawful means contrary to law. And in this particular case it means contrary to a law which was passed by Congress which says that you cannot use implicit or express threats in order to collect a debt. In essence, that is the law that we're talking about, and that is what this conduct must be violative of.

The defendant doesn't need to know the section by number. It happens to be 894 of Title 18, but he doesn't have to know that number. If the acts constitute

the crime, then he would be acting unlawfully. The word knowingly as used in the crime charged means that the act was done voluntarily and purposely and not because of mistake or accident. And the knowledge may be proved by the defendant's conduct and by all the facts and circumstances surrounding the particular instances in the case.

The word willfully as used in the crime charged means that the act was committed by the defendant voluntarily with knowledge that it was prohibited by law and with the purpose of violating the law and not by mistake, accident or in good faith.

Title 18, Section 894 of the United States Code was passed by Congress in 1968. It reads as follows insofar as it applies to this case:

"Whoever participates in any way in the use of extortionate means to collect or attempt to collect any extension of credit is guilty of a crime."

I call your attention to the fact that as a matter of law I have consolidated the two counts which are in this indictment, and it now charges one count, a course of conduct which started on November 5, 1975 and continued on through November 7, 1975. The substance of this charge in the indictment is that the defendant used express threats or the use of violence on another, which the testimony indicates was Johnson, as a

means to collect or attempt to collect a portion of the loan which was unpaid at the time. In order for you to convict this defendant there are four elements which the government must prove by credible evidence beyond a reasonable doubt before you may convict him. If they fail to prove any one or more or all, then it is your obligation to acquit him.

The four elements are these: In order to find the defendant Clarence R. Sears, Jr. guilty on this count, you must be convinced that each of the following elements has been proved beyond a reasonable doubt by credible evidence.

First, that there was an extension of credit to James Johnson. Now, that first requirement is in layman's language, that there was a loan made to Johnson. There is no dispute about that. Both sides agree that there was a loan. So the first element is by agreement between them, but you must find it as a fact in any event, because you can't even substitute their agreement. But the testimony in the case is that there was a loan, Johnson says so and Sears agreed.

Second, that on or about the dates set forth in the indictment, namely November 5, 1975, and November 7, 1975, Clarence Sears collected or attempted to collect the extension of credit. So that what we're

saying is the second element is that he called the loan, that he wanted his money back. Both sides agree on this. There is no question about that at all, but here again you must make a finding of fact as to that. So that is the second element.

Third: That the defendant used or participated in any way in the use of any extortionate means to collect or attempt to collect the extension of credit. And here again, what we're talking about is what was said on those two occasions. Both sides agree what was said. Mr. Sears in taking the stand, in his testimony, said, "Yes, on November 5, 1975, I did say that to him." And on November 7, 1975 that conversation was entered into between the parties. So that you will have to make a judgment on that also. That is the third element.

The fourth element is that the defendant acted unlawfully, knowingly and willfully; and those are the terms that I defined to you a little while ago. Namely, that he knew that he was making those statements, that he acted voluntarily, he didn't make those statements through mistake, inadvertance or error, and that he was conscious of making those statements, and that he did it with a bad purpose.

The willfull aspect of it means that you act with

a bad motive. The Romans used to c that in their law, the mens rea, or evil intent. Bad motive. He must act in that way. Of course we know that it has to be in the Southern District of New York and I told you that I have taken judicial notice of the fact that it was in the Southern District of New York. There are certain words in these elements which I have described to you which I will further describe to you.

The first element you must find beyond a reasonable doubt in order to find the defendant, Clarence Sears, guilty is that James Johnson had been extended a loan, extended credit. The statute says to extend credit is to make or renew any loan or to enter into agreement at a set or express whereby repayment or satisfying of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred. In other words, the government must prove that there was still some repayment of principle or interest due on the loan, and you will recall that he paid part of it first, a thousand dollars, and then when the conversations took place there was still due a thousand dollars plus various amounts; one time they said $400, $700 at the final end of it.

In reference to the second element, before you

find the defendant Clarence Sears guilty, is that he collected or attempted to collect the loan. To collect the loan means to induce a person in any way to make a repayment of the loan and here of course Johnson's testimony is that he was being threatened and he was being told that if he didn't do it on the one occasion he would be blown away and on the other occasion he would be wasted, and the other language that appears.

The third element is that the defendant used extortionate means to collect or attempt to collect the debt. This is defined in the statute as follows:

"Any means which involves the use of express or implicit threat of use of violence or other criminal means to cause harm to a person's reputation, property or person."

Here of course the government claims, and Johnson claims, that the threat was against his person, not against property or other things or the reputation. But he was being threatened personally with being killed if he didn't pay the loan. The fourth element is that the defendant acted unlawfully, knowingly and wilfully.

I have already defined these terms. Moreover, in deciding whether the defendant wilfully used threats of physical harm or other criminal means, you must

decide whether the defendant's words and/or actions were reasonably calculated by him in the light of the surrounding circumstances to instill fear in the person to whom they were directed or in any other ordinary person.

In other words, what we're saying is, if what Sears said would in Johnson's or in an ordinary person make them feel that they were being threatened, that they should be fearful of their life, that is the concept we're talking about at this time. You should take into consideration on this question all of the evidence in this case bearing on what the defendant intended by his statements and/or actions. You may consider what if anything the defendant knew about the person to whom his statements were made, the nature of the transaction, the amount involved, and any other surrounding circumstances you may find in the case.

Again, the crucial question on this first element for you to decide is: Did the defendant reasonably calculate by his words to instill fear or to give the impression that physical harm or other criminal means would be used to the person to whom these statements were directed, or to an ordinary person. The defendant need not, however, have intended to carry out the threat to be guilty of the crimes charged. That is immaterial in the case.

Even though Sears says, "Well, I really didn't intend to do that," that is not the measure of this particular element. What is involved here is how did that affect Johnson or an ordinary person who would hear this? What's the effect on the one that hears it? Is he in fear? That is the standard that you must use in determing this. So that in summary, you must find that the government has proved to your satisfaction beyond a reasonable doubt, by credible evidence beyond a reasonable doubt, each of the elements of the crime which I have just described to you before you may find the defendant guilty under the count in this case.

There is only one count. If any one or more or all of these elements or counts are not proved to your satisfaction by credible evidence beyond a reasonable doubt, then you must find the defendant not guilty.

The consideration of this case depends upon a very careful consideration by you of all the evidence in the case, the totality of it, not any particular part of it alone, but the whole ball of wax, and then making a judgment based on your analysis of this evidence.

Sympathy and bias play no part in this case. We have other places where we can go for sympathy, and bias -- well, we shouldn't indulge in bias at all. We should set it aside.

Because the fact of the matter is that it is not part of this case. It can't help you in deciding the facts in this case in any way whatsoever. The facts in the case must be decided upon the evidence that you hear here and not any sympathetic feeling or bias that you may have in this particular case, and you must decide this case, we take an oath as judges, and you must decide it in a similar vein, without fear or favor. We don't fear or favor any particular class, any particular body of men, any particular institution. We decide the case, and you must decide the case solely upon the evidence as you hear it in the court room. In effect, what you are being told here is to vote your conscience in the matter, after you have seriously discussed the evidence in this case and made a judgment on it, based upon the law as given to you by the Court.

Possible punishment in this case is of no concern to you and should not come up in your discussions because it can't help you determine the facts whatsoever. No matter what the punishment is, it can't help you in judging what the facts are. Punishment as a matter of fact, is the obligation of the Court, and the jury, in this court, is never a party to punishing anybody. Mr. Foreman, your verdict must be unanimous in this case.

Before you can report a verdict, all twelve jurors must agree. As one of the lawyers said to you, please discuss the case. That is so. All the times, the few times that I have asked you to leave and come back, I have admonished you, you may not discuss this case.

I once had a jury that was out for about eight hours and I finally called the foreman and said, "What's going on?" He said, "Well, you told us not to discuss the case." They were sitting in there for eight hours looking at each other and nobody ever said a word. This is the end now, right? You do discuss the case, you do go into the various aspects of it. You swap opinions, and you don't say, "Hey, I think so and so"before you hear from anybody. When you get down to it, don't give up your own thinking and your own conscience unless you are satisfied.

On the other hand, you must listen to other argument and evaluate it and use your own judgment and your own conscience and come up with a judgment that is in accordance with your feeling and conscience in the matter. If there comes a time when somebody said, "Sears said that," and the other person said, "Oh, no, that is another date," or something, we have no problem. This has all been taken down by the reporter. All you have to do

tell us,"We want to hear the testiony read again," Mr. Foreman, please pinpoint it as much as you can,the name of the witness, whether it was on direct examination or cross examination, as much as you can, because he has to find it in his green box he's got over here, then we'll call you in and he will read it to you. Any communications with the Court from the jury will be made through the foreman. You will be given some paper and if you want to communicate with the Court, you put the message on there. It will be signed by the foreman, sealed by him and given to the marshal who will have you in custody at the time.

I have one last time that I talk to the lawyers about the legal aspects of this case, and if you will excuse me at this time, we'll do that now and then we'll continue then.

(At the side bar.)

THE COURT: Mr.Curley, any exceptions?

MR. CURLEY: I have a minor suggestion, your Honor. In discussing the interest of witnesses, your Honor referred to Mr. Johnson as the victim. Obviously it's the defense contention that he is not, and he would suggest that he is the complaining witness. I'm sure your Hon didn't mean to imply it in any way, and if it's the only

matter being brought to the jury's attention, I will drop it. But if your Honor is going to speak to them again on other matters from either side, I'd respectfully suggest that.

MR. JOSSEN: May I be heard on that? The government opposes that request.

THE COURT: Wait a minute. We may not have any problem, but he says if he has nothing else, he won't press it.

MR. JOSSEN: The government has a number of exceptions as well.

MR. CURLEY: I do have two other matters.

In discussing the elements, point 3, your Honor referred to extortionate means, and at that point you commented that there is substantial agreement,"I think there is substantial agreement as to what was said as to the first element that there was a loan and an attempt to collect it."

I would request that the Court indicate that there is diametrical opposition as to what was the meaning of the terms and whether or not there is no agreement between counsel and parties that these were extortionate means to collect the loan.

THE COURT: Okay.

MR. CURLEY: The defense maintains that while there is substantial agreement as to what was said there was no extortionate attempt to collect the loan.

THE COURT: Okay.

MR. CURLEY: Finally, your Honor, I would have liked to press this earlier, but in light of my summation and your Honor's motion to consolidate the two counts, it has dawned on me that there is a factual issue in this case as to whether or not some or all of the words used by my client were based upon the failure of Mr. Johnson to repay the loan exclusively, or based upon the failure of Mr. Johnson to respond to that failure in a manful manner, as is discussed on the tape, in which Mr. Sears indicates that he is pretty much concerned and excited about the fact that he had to go looking for Johnson, that Johnson failed to pay, failed to call him, and he's really been ducking the issue; and that some of these actual words that are so crucial in this case are ambiguous in that context, whether they are meant to spur Mr. Johnson to repay the loan or to spur him to respond in a more manly fashion.

THE COURT: Well, you make the argument to the jury.

MR. CURLEY: I'd like the instruction that the

jury would have to find beyond a reasonable doubt that these expressions are used solely, or these terms were used solely in an attempt to obtain repayment of the loan, and if they should find that they were used in this other sense of which I have argued to the jury, they could not convict the defendant.

THE COURT: I decline to do that.

MR. JOSSEN: Your Honor, first, I assume it is an oversight, but I did not hear your Honor charge that the verdict be unanimous.

THE COURT: I did. I directly spoke to the foreman and told him he couldn't report it until this was unanimous.

MR. JOSSEN: Your Honor, the government would request that the Court instruct the jury that whether Mr. Johnson understood the statements made by Mr. Sears as threats, has no bearing on the case, because under United States versus Natale it is the defendant's actions and the defendant's intentions which is controlling and prohibited by the statute. Your Honor suggested in the charge that whether Mr. Johnson considered them threats was a matter for the jury to consider, and the government suggests that that is not the law.

Further, your Honor, the government would

oppose Mr. Curley's request that your Honor say something more about Mr. Johnson being the victim in connection with his interest. The government submits that your Honor has given perhaps an excessively fair charge to the defendant on the question of interest between the victim and the defendant, and that nothing further should be said.

THE COURT: I'm not going to say anything further about anything. I have noted all these exceptions. I don't intend to say anything further.

MR. CURLEY: I disagree with Mr. Jossen's request.

THE COURT: The only thing I would be inclined to say was in reference to Johnson's state of mind, that it is not actually his state of mind, but his possible state of mind in effect. But I'm not going to go into that either at this point. I think the jury has sufficient to judge.

MR. JOSSEN: Your Honor, the government would strenuously request that you make that instruction to the jury because we're concerned that the jury will focus on whether Mr. Johnson considered it a threat, whereas the real question is what did Mr. Sears intend by his statement.

THE COURT: I think in defining the terms,

etcetera, that is covered. I decline to do so.

(In open court.)

THE COURT: Mr. Damiano and Miss Hebard, I want to thank you for your service to the court. Under the statute at this point in time I am obliged to discharge you because there is no further need for you at this time.

However, I do thank you on behalf of the court for the service you have rendered at this point. Please return to the jury room. You know where it is, and report to the jury clerk.

(The two alternates were discharged and left the room.)

(At 11:20 a.m. a marshal was duly sworn.)

(At 11:29 a.m. the jury retired to deliberate upon a verdict.)

(Recess.)

(At 12:55 p.m. a note was received from the jury.)

(Court's Exhibit 1 marked for identification.)

THE COURT: All right, bring in the jury.

(The jury entered the courtroom.)

THE COURT: I have a note from the jury which will be marked a court exhibit. It requests the following

"One: Please restate the four points of law. Two: Replay the tape and furnish transcripts. Three: The bankbook. Four: The receipt for a thousand dollars. Five: Sears' statement under cross examination admitting to making the statement he would 'Come to his house and blow him away'," signed by the foreman.

Your lunch has just arrived. I think the first order of business will be to have your lunch, in the meantime I will send in the evidence that you requested, the exhibits, and then we'll reconvene at 2:00 and at 2:00 we will go on with the rest of your request. Because the lawyers have to go out and eat as well as yourselves, and I also have to have lunch. So you can retire at this time. Your lunch is in there now, and have your lunch, and at 2:00 we'll start in and answer the rest of your requests.

(The jury left the courtroom.)

THE COURT: May I see the lawyers a minute, please. They have requested the transcript. I don't know whether you want to send that in to them or not.

MR. CURLEY: The transcript of the tape?

THE COURT: That is what he says. "Replay the tape and furnish transcripts."

MR. CURLEY: I have stipulated to its

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substantial accuracy. I have no objection.

MR. JOSSEN: Your Honor, my suggestion would be that we bring the jury out after lunch, play the tape with the transcript furnished to them at that time so that they can hear the tape with the transcript in their possession. Then if they wish to take the transcript into the jury room, I would have no objection to that. I think, however, we should have the tape played first.

THE COURT: I intend to play the tape. Also, at that time, of course they would have the transcript. The question is, after that happens, you are saying if they desire to take this with them, any objection?

MR. CURLEY: No, if they make the suggestion.

THE COURT: There is a lady here that would like to leave a message for her husband saying that she is deliberating and can't call. Any objection?

MR. CURLEY: No objection, Your Honor.

MR. JOSSEN: No objection.

THE COURT: This is also made a court exhibit, number 2. The marshal is given permission to make the call. What she is saying is please telephone Jack Strickland at such and such a number and say that Winifred Nail is sequestered and cannot make a call, etc.

We'll reconvene at 2:00.

MR. CURLEY: Is your Honor sending the exhibits in now or at 2:00?

THE COURT Just the bankbook and the other one about which there is no question.

MR. JOSSEN: Your Honor, there is one point about the note --

THE COURT: There is just the date in the corner. I will bring that to their attention.

MR. JOSSEN: May we move the date? Since it was put into evidence without it, I don't see why we cannot excise it.

MR. CURLEY: I have no objection. I was just thinking if we're going to hold off until 2:00 with the others, we can hold off with those too.

THE COURT: All right.

(Luncheon recess taken.)

AFTERNOON SESSION

2:05 P.M.

(In open court, jury not present.)

MR. CURLEY: Your Honor, we have a slight dispute with reference to the cross examination.

THE COURT: I will let the jury tell me what they want.

MR. JOSSEN: Your Honor, I would have again a further request. I am concerned that the date in the upper left-hand corner of Government's Exhibit 2 may confuse the jury in some way.

THE COURT: We're going to cover that up or cut if off or tell them that it doesn't apply.

MR. JOSSEN: We can cut it off then, is that right, Mr. Curley? Do you have any objection?

MR. CURLEY: Whatever the Court suggests, I have no objection to.

THE COURT: All right. Cut it off and we can put it on again some other time.

(The jury entered the courtroom.)

THE COURT: In answer to the first request, "Please restate the four points of law," and I assume that that means the four elements that are required in order for you to find the defendant guilty, and that the obligation

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is on the government to prove those four elements by credible evidence beyond a reasonable doubt.

THE FOREMAN: That's correct.

THE COURT: The first one is that a loan was made by Sears to Johnson.

Second, that on November 5th and November 7, 1975, Sears attempted to collect the loan from Johnson. First there was a loan, Sears attempted to collect it.

Third, that Sears used extortionate means to attempt to collect the loan.

And lastly, that Sears acted unlawfully, knowingly and willfully.

Those are the four elements. Do you want me to repeat them?

Number one, there was a loan.

Number two, Sears attempted to collect the loan on November 5th and November 7th.

Three, that he used extortionate means to try and collect the loan.

And four, that he acted unlawfully, knowingly and willfully.

Do each of you understand that now?

JUROR No. 5: The fourth one.

THE COURT: Wait a minute. I will put it on th

lackboard so there is no question in your mind.

(Pause.)

THE COURT: There was a loan, do you understand that? All right.

Number two, that on the 5th and 7th Sears attempted to collect the loan, do you understand that?

Three, that extortionate means were used to try and collect the loan.

And four, that in doing that he acted unlawfully, knowingly and willfully.

Is that clear to you now? What is it that is not clear to you?

JUROR No. 5: What that means, the fourth one.

THE COURT: Unlawful means against the law, the law passed by Congress that says he can't use extortionate means to collect the loan. He is acting unlawfully if he does that.

Willfully means he does it voluntarily, not through mistake, inadvertance or good faith, that he did all the acts that he did in telling Johnson, "I want my money," that he didn't do that by somebody forcing him to do that, that he did it by himself on his own free will. And the last one, willfully, means that he's got a bad intent,

that he's violating the law and realizes that he's violating the law to collect this money. That he knows what he is doing and doing it voluntarily and freely, not through mistake, not through inadvertance.

Does that clear that up now? Okay.

Then the next request, "Replay the tape." Do you have it set up. And furnish the transcripts. Please give the jury the transcripts.

I don't think it makes any difference which one you take because you have not written anything on them, so just pass them along.

(Tape played.)

THE COURT: The next request is the bankbook. Do you have it? Give it to the foreman. The next request is the receipt for the thousand dollars. Give it to the foreman.

The fifth request is Sears' statement under cross examination admitting making the statement he "would come to his house and blow him away". Do you have that portion of the testimony, Mr. Reporter?

THE REPORTER: Yes, your Honor.

MR. JOSSEN: Your Honor, may we approach the bench for a moment?

(At the side bar.)

MR. JOSSEN: Before the luncheon recess there had been some discussion between Mr. Curley and myself as to just what was to be read from the cross examination.

There are a number of questions, a section of the cross examination which we feel pertains to the jury request. The government had suggested to Mr. Curley that there are about three or four questions dealing with whether Mr. Sears was drunk or drinking on November 7th, which we feel should not be read and excised from that portion of the testimony which is read, and Mr. Curley had disagreed with that. We thought we should approach the bench so that we're clear what is going to be read.

THE COURT: I'm not going to have the reporter pick and choose, he will start with this particular subject and if there is anything in between, he will read that also.

(In open court.)

(Record read.)

THE COURT: This has complied with the jury request. You may retire and deliberate. We'll collect the transcripts from you at this time.

(At 2:25 P.M. the jury resumed deliberations.)

(Recess taken.)

(At 3:35 P.M. a note was received.)

(Court's Exhibit 3 marked for identification.)

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(In open court, jury not present.)

THE COURT: The first request I have is for another telephone call. Is there any objection to the marshal calling a person and advising them that they are still here?

MR. CURLEY: No objection.

MR. JOSSEN: No objection, your Honor.

THE COURT: All right. That is Court Exhibit 3.

(Court's Exhibit 4 marked for identification.)

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THE COURT: All right, bring in the jury.

(The jury entered the courtroom.)

THE COURT: I have a note from the jury which is marked a court exhibit. The members of the jury are still confused as to what constitutes extortion or a threat under the law. Spec, which means specifically, must the victim feel frightened as a result of what is said or does the fact that there was made --

or does the fact that a threat was made stand by itself? In the first place, you recall the statute says that extortionate means is defined as follows: Any means which involves the use or an express or implicit threat or use of violence or other criminal means to cause harm to the person, reputation or property of any individual. So that is what we mean by an extortionate means. Extortion as far as this statute is concerned includes any act or statement which constitutes a threat if it instills fear in the person to whom they are directed or are reasonably calculated to do so in the light of the surrounding circumstances. In answer to your specific question, must the victim feel frightened as a result of what is said? No, doesn't make any difference whether he gets frightened or not. In reference to the second part of it, does the fact that the threat was made stand by itself? Yes. In other words, you are to consider what the defendant said and what he intended the effect that would have on the other person. What he, the sayer, the deliverant, what he intended that statement, what effect that would have on Johnson. So the fact that Johnson was or was not afraid actually as a fact is not relevant in this case. What is relevant is when Sears said that, what did he intend to convey to Johnson? Did he

intend to put him in fear? Did he intend to use his language, to use psychological force to force him to pay this? If that is what he intended, then he violated the law. Is that clear? All right. You may return to deliberate.

THE FOREMAN: We are returning the exhibits.

THE COURT: All right.

(At 3:50 P.M. the jury resumed deliberations.)

(Recess taken.)

MR. CURLEY: May I note an exception to your Honor's recharging the jury on that point, especially the latter part in which the terms of the context of which Mr. Sears made the remarks.

THE COURT: I tracked Natale on it. If you can show me where I didn't track Natale, tell me. What do you think I should have said?

MR. CURLEY: At the time Mr. Sears made the remarks to Mr. Johnson, those remarks can be considered in their context in consideration of all the facts and circumstances.

THE COURT: I did say that to them.

MR. CURLEY: I think your Honor said that in the beginning, but then as you continued you went into certain definitions concerning what he said at the time and

just said, did he say what he says he said or what the government contends and did he mean it at that time and you should have left it at that point.

THE COURT: I disagree. You have an exception to the Court's charge. All right, gentlemen.

(Recess taken.)

(At 4:35 P.M. a note was received from the jury.)

(Court's Exhibit 5 marked for identification.)

THE COURT: Bring in the jury.

(The jury entered the courtroom.)

THE COURT: The Court has a note from the jury which will be marked as Court Exhibit 5. The jury requests to know if a verdict can be made with a recommendation.

Unfortunately, in our court we do not have that practice, and as I explained to you in my remarks earlier, this can't possibly help you with deciding the facts. So that the answer to this question is no, you can't make a recommendation. You may retire.

(At 4:30 P.M. the jury resumed deliberations.)

(Recess taken.)

MR. CURLEY: Judge, I have a request at this

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time. I think we can assume that the only verdict being considered is that of guilty, with a recommendation. It seems to me that there may be some forgetfulness about what is the Court's definition of proof beyond a reasonable doubt, and that this suggestion is an awkward way of phrasing an attempt to compromise the burden and the duty that they have. Accordingly, I would request that the Court ask the jury to return to remind them that the burden is on the government to prove the defendant's guilt of each and every element beyond a reasonable doubt, and to define again the term reasonable doubt.

THE COURT: I decline to do so.

(Recess taken.)

MR. JOSSEN: May the record reflect with Mr. Curley standing next to me, that prior to the commencement of this trial on Wednesday, the government turned over to Mr. Curley Government's Exhibits 3501 through 3503 in compliance with Title 18, Section 3500. More particularly, that material is as follows: 3501, Grand Jury testimony of Johnson.

3502, interview of Johnson.

3503, Johnson's permission to record telephone call.

3504, employee's record of Johnson's complaint.

3505, police report of Johnson's complaint.

3506, statement of A. Young.

3507, statement of J.R. Burrell, Jr.

3508, P.M. Renzulli report to U.S. Attorney.

3509, P.M. Renzulli report to postmaster, Bronx, New York.

THE COURT: Mr. Curley, is that correct?

MR. CURLEY: Yes.

(Recess.)

(4:40 P.M., a verdict was reached.)

THE COURT: All right. Call in the jury, please.

(The jury entered the courtroom.)

THE COURT: The jury has reported a verdict. I have the following note from the foreman, Mr. Ferris: "The jury has found the defendant guilty as charged."

The clerk of the court is directed to proceed.

THE CLERK: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded. You say you found the defendant guilty.

(Each member of the jury, upon being asked, "Is that your verdict," responded in the affirmative.)

CERTIFICATE OF SERVICE

June 9, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.